

**BEFORE THE CITY COUNCIL
FOR THE CITY OF TIGARD, OREGON**

**In the Matter of an Application by
Venture Properties, Inc. for a Zoning
Map Amendment from R-12 to R-7, a
53-lot Subdivision and a Variance
Application, for Property Located
West of SW Hall Boulevard and South
of SW Bellflower Street and North of
SW Hamlet Street in the R-12 Zoning
District (the “Site”)**

**DRAFT FINDINGS OF FACT AND
CONCLUSIONS OF LAW REVERSING
THE PLANNING COMMISSION’S
DENIAL OF THE APPLICATIONS AND
APPROVING THE APPLICATIONS.**

I. PROCEDURAL STATUS.

This matter comes before the Tigard City Council (the “City Council”) on an appeal of the Tigard Planning Commission’s denial of the applications effective on June 1, 2015. The City Council finds that the Applicant, who is also the Appellant, filed a timely appeal of the denial on June 15, 2015.

The City Council held a *de novo* hearing on the appeal on July 15, 2015. City Council closed the public hearing and the record to all other parties except the Appellant and allowed the Appellant to submit final written argument no later than July 28, 2015 at 5:00 p.m. The City Council set September 8, 2015 as the date for deliberation and a possible tentative decision on the Application.

The City Council finds that no party challenged the City Council’s jurisdiction to hear the appeal, raised and preserved a procedural error, or challenged any City Council member’s right to participate in the decision.

**II. FINDINGS REJECTING THE PLANNING COMMISSION DENIAL AND
SUPPORTING THE APPEAL.**

A. Incorporation of applicant’s narrative.

The City Council hereby adopts these findings as its own, rejecting the Planning Commission’s denial of the applications and granting the appeal. The City Council hereby incorporates the conditions of approval recommended by the Planning Department staff, which would have been adopted by the Planning Commission had it approved the applications. The City Council also incorporates the Applicant’s revised narrative dated March 24, 2015 in its entirety consisting of pages 3-80 and submitted to the City on March 25, 2015. To the extent there is a conflict between the incorporated Applicant’s narrative and these findings, these findings shall control.

B. Additional findings supporting the zoning map amendment.

1. Subdivision Application.

The City Council finds that the Planning Commission denied the subdivision application because the Planning Commission also denied the zoning map amendment, thus rendering the subdivision application inconsistent with the R-12 zoning district. Because the City Council approves the zoning map amendment, it also approves the subdivision application.

a. TCDC 18.430.040.A.1. The City Council finds that this standard can be approved if the zoning map amendment is approved.

b. TCDC 18.715.020.A-.C. The City Council finds that the density standards can be met if the zoning map amendment is approved.

c. TCDC 18.810.030.A.3. The Planning Commission did not make a finding on whether the pavement section on SW Hall Boulevard meets Oregon Department of Transportation ("ODOT") standards. The City Council finds that the Planning Commission did not conclude that this standard was not met. The City Council finds that this standard is met.

d. TCDC 18.810.060.B. The City Council finds, as did the Planning Commission, that lots 4 and 30 can be conditioned to provide a minimum of 25' of frontage on SW Schmidt Loop, thus meeting this standard.

e. TCDC 18.810.070.C. The City Council finds that the Plan can be conditioned to provide a 6' wide concrete sidewalk adjacent to the curb.

2. Variance Application (Special Adjustment to Street Standards).

The Planning Commission Decision at page 5 explains that the Appellant requested a special adjustment to street standards to provide an alternate street section for the proposed local street extensions of SW Ashford Street and SW Applewood Avenue to match existing street sections to the north and west. The Planning Commission concluded that the variance and adjustment standards have been met. The City Council hereby makes the same findings.

a. TCDC 18.810.030.E (page 17). The Planning Commission found that this adjustment should be allowed.

For these reasons, because the City Council finds that the zoning map amendment can be approved, it also approves the variance application (special adjustment to street standards).

3. Zoning Map Amendment from R-12 to R-7.

The City Council finds that all applicable TCDC requirements and Tigard Comprehensive Plan ("TCP") policies are satisfied. It is clear that the proposed R-7 zoning district is more compatible with the surrounding residential development than is the R-12 zoning district. The R-12 and R-7 zoning districts are consistent with the acknowledged Plan designation of "Medium-Density Residential" for the Site and, more importantly, the Site is surrounded on the west side of SW Hall Boulevard by other R-7 development and is adjacent to other R-7 development on the east side of SW Hall Boulevard. Only a small area of R-12 development is across SW Hall Boulevard from the southeast corner of the Site but it is developed to R-7 standards.

Additionally, of eight (8) persons who testified at the May 18, 2015 Planning Commission hearing, none of them testified against the zoning map amendment. Two (2) persons testified solely based on the impacts of the development to wetlands. The Planning Commission concluded at page 33 of its decision that, because the wetlands are not listed as "significant" on the Tigard Local Wetlands Inventory ("TLWI") map, the TCDC only requires the City to ensure that state and federal permits are obtained by the Applicant. Six (6) persons told the Planning Commission that they thought the proposed R-7 zoning district would be more compatible with their development than would be the R-12 zoning district. Three (3) persons testified in favor of the Application at the City Council hearing.

Finally, some of the TCP policies found not to be satisfied by the application are not applicable to the Application. TCDC 18.380.030.C.1 requires that the Applicant demonstrate compliance only with *applicable* Plan policies and map designations. As explained below, because some of the Plan policies are not applicable, they are not a basis for a denial of this Application.

a. **TCDC 18.380.030.B.1.** The City Council finds, for the reasons explained below, that all *applicable* Plan policies are met.

b. **TCDC 18.380.030.B.2.** The City Council finds that the Metro Functional Plan is neither part of "this Code", nor is it an "applicable implementing ordinance". In the alternative, the City Council finds that the Metro Functional Plan is an "applicable implementing ordinance" and, for the reasons explained below, the City Council finds that the Applicant has met its burden of proof to demonstrate that this zoning map amendment will have only a "negligible effect" on the City's overall zoned residential capacity.

c. **TCDC 18.380.030.B.3.** The City Council finds that TCDC 18.380.030.B.3 is satisfied. This criterion requires:

“Evidence of change in the neighborhood or community or a mistake or inconsistency in the comprehensive plan or zoning map as it relates to the property which is the subject of the development application.”

The Application narrative explains at pages 16-19 how this area has substantially changed since the imposition of the R-12 zoning designation in 1983, more than 30 years ago. The area has become increasingly less dense since 1983. TCDC 18.380.030.B.3 allows the Planning Commission to approve a quasi-judicial map amendment with “evidence of change in the neighborhood . . .”

The City Council need not find that all three (3) of the criteria in TCDC 18.380.030.B.3 are met because the criterion uses the word “or” between the three (3) factors. The Application narrative demonstrates that the neighborhood has changed. The City Council makes this determination by noting that the surrounding development pattern is consistently lower density single-family in this area. This Site is the only remaining vacant site in the area. The area that has developed around the Site has developed under low-density residential standards and development of the Site in the R-12 zoning map designation would be inconsistent with the surrounding development.

TCP Policy 2.1.15.F provides that “land uses permitted by the proposed designation would be compatible, or capable of being made compatible, with environment conditions and surrounding land uses.” The Application narrative explains that development in the R-12 zoning district would be *incompatible* with surrounding land uses. The Applicant would be required to either develop small lot detached single-family housing (with a minimum lot size of 3050 square feet, compared to a minimum lot size of 5,000 square feet in the R-7 zoning district), or multiple-family housing with the parking areas on the perimeter of the site. Neither type of housing would be compatible with, nor welcomed by, the surrounding residents.

d. The City Council finds, based on substantial evidence in the Application narrative, that there is evidence that there has been either a change in the neighborhood or that a mistake in the zoning has occurred.

e. TCP Policy 2.1.2. The City Council finds, based on substantial evidence, that the zoning map amendment is consistent with and will implement the Plan.

f. TCP Policy 2.1.5. TCP Policy 2.1.5 provides:

“The City shall promote intense urban land development in Metro-designated Centers and Corridors, and employment and industrial areas.”

The Applicant acknowledges that SW Hall Boulevard is a Metro-designated "Corridor." However, the Planning Commission erred in finding that Plan Policy 2.1.5 is not met by the Application. As explained at pages 2 and 3 of the Applicant's May 6, 2015 letter, this TCP Policy calls only for the City to *promote* intense urban-level development in designated corridors. TCP Policy 2.1.5 says nothing about whether the City may change a zoning map designation in a case such as this, where the change makes the zoning map designation consistent with the development of surrounding property, and the change is supported by, and implements, other TCP Policies.

The TCP Policy does not prohibit other than intense urban-level development along Corridors. The City Council can take official notice of the fact that much of SW Hall Boulevard consists of medium-density residential development, or lower-density residential development, similar to the requested R-7 zoning district for the Site.

Finally, this zoning map amendment complies with, and implements other, applicable TCP policies which, when balanced against this TCP Policy, requires the City Council to approve this zoning map amendment.

Moreover, this TCP Policy says nothing about how much intense urban-level development must be promoted by the City, or where it must be located along a Corridor. The City can certainly find that this TCP Policy has been satisfied along SW Hall Boulevard without denying this Application. For example, there is intense urban-level development at the north end of SW Hall Boulevard adjacent to Highway 99 and intense urban-level development at the terminus of SW Hall Boulevard near Durham Road.

Finally, this TCP Policy does not prohibit the City from making a common sense decision where it is clear that the current zoning map designation is inconsistent with surrounding development. “Intense urban land development” in the middle of less-dense single-family development is inconsistent with the City’s Land Use Planning Program. Plan Goal 2, “Land Use Planning”, Section 1, “Legislative Finding” at pages 2-3 and 2-4 states:

“Within residential areas, the City’s land use program assures that infill occurs in a way that is sensitive and complimentary to existing residential neighborhoods”.

This vision is implemented by TCP Policy 2.1.15.D which calls for zoning map amendments to be compatible with surrounding areas. This Application achieves the purpose of the City’s land use program, whereas leaving the R-12 zoning district in place does not.

The Planning Commission can either find that Plan Policy 2.1.5 is satisfied by this Application, or does not apply to a quasi-judicial map amendment, or does not prohibit approval of this Application.

g. TCP Policy 2.1.14. The City Council finds that the Applicant has met its burden of proof to demonstrate that the zoning map amendment is consistent with the applicable criteria of the TCDC, the Plan, and the Metro Functional Plan, for the reasons explained in this letter and other evidence submitted by the Applicant.

h. TCP Policy 2.1.15.C. The City Council finds that the Application demonstrates that there is a "proven community need" for an R-7 zoning district in this particular location because, as explained in the Application, the R-7 zoning district is the most compatible zoning district with the surrounding development and substantial evidence demonstrates a need for additional R-7 housing at this location, in part, because of the requirement for compatibility.

i. TCP Policy 2.1.15.D. The City Council finds that the Application demonstrates that there is an inadequate amount of developable, appropriately designated land for R-7 lots, whereas there is more than adequate available R-12 land, including the River Terrace area based on evidence in the Application.

j. TCP Policy 2.1.15.F. The City Council finds that the Planning Commission misapplied this TCP Policy. This TCP Policy provides that "land uses allowed in the proposed designation would be compatible, or capable of being made compatible, with environmental conditions and surrounding land uses." The Planning Commission misapplied the policy because it does not require a demonstration of incompatibility; the Plan Policy simply requires a demonstration of compatibility. Substantial evidence in the record demonstrates that the R-7 zoning district is inherently more compatible with the adjacent R-7 zoning than is the R-12 zoning district. Moreover, the Planning Commission erred in another way because it adopted the word "significantly" when this word does not appear in Plan Policy 2.1.15.F.

k. TCP Policy 6.1.3. The City Council first finds that this Plan Policy is inapplicable. This Plan Policy calls for the City to *promote* certain types of land use patterns, but does not require them. To the extent that the City Council finds that this Plan Policy is applicable, substantial evidence supports a finding that the R-7 zoning district, which

matches the zoning district of the surrounding development, promotes compatibility with the existing neighborhoods, does not increase dependency on the automobile and does not decrease opportunities for walking, biking and/or public transit. No evidence in the record demonstrates that more people will drive from the R-7 zoning district, or that fewer people will walk, bike or use public transit from the R-7 zoning district. Regardless of how the Site is zoned, the City Council can conclude that transit remains available (through Tri-Met bus line 76) on SW Hall Boulevard, that sidewalks are located on the interior residential streets and along SW Hall Boulevard, and that most residents use their automobiles to shop and work. The zoning of the Site will not affect the use of automobiles, or biking, walking and transit use.

l. TCP Policy 10.1.1. The City Council finds that this Plan Policy is not applicable to the decision because a zoning map amendment is not a "land use policy, code and standard".

m. TCP Policy 10.1.5. Plan Policy 10.1.5 provides:

“The City shall provide for high and medium density housing in the area such as town centers (Downtown), regional centers (Washington Square), and along transit corridors where employment opportunities, commercial services, transit, and other public services necessary to support higher population densities are either present or planned for in the future.”

A comparison of an aerial photograph of the developed area and the City’s zoning map designation for this site that this Plan Policy is not promoted by leaving this property in its current R-12 zone. First, as the Application narrative explains, notwithstanding that SW Hall Boulevard is served by Tri-Met Bus Line 76 does not operate at headways that support higher population densities nor is SW Hall Boulevard a “transit corridor”. Bus Line 76 operates at only 30 minute headways throughout the day.

Second, this TCP Policy calls for the City to direct high and medium density housing to areas, such as town centers and transit corridors, where employment opportunities and commercial services are either present or planned to support higher population densities. The surrounding area is not within downtown Tigard or Washington Square. Moreover, the surrounding area is a wholly residential area without any employment opportunities or commercial services that support or justify higher population densities.

The City Council finds that this TCP Policy is not applicable because the Site is not along a "transit corridor" in an area where employment opportunities, commercial services, transit and other public services necessary to support higher population densities are either present or planned for in the future. There is no Tigard map designation of "Transit Corridor" on the Site, nor did the Planning Commission define the term. Substantial evidence demonstrates that the Site is located in an area of predominantly single-family homes with no significant retail or employment opportunities anywhere in the area. The fact that Tri-Met bus line 76 may connect to other very distant areas that constitute employment or commercial opportunities does not defeat the fact that this area is an area where these opportunities are not present.

In the alternative, if this TCP Policy were applicable, the City Council finds that it is satisfied by the application because TCP Policy 10.1.5 calls for the City to provide for high and medium density housing in areas with certain characteristics not found in the area in which this site is located.

n. TCP Policy 10.2.5. The City Council finds this Plan Policy is not applicable to a quasi-judicial application because it directs the City to implement certain types of housing by "encouraging" certain activities.

o. TCP Policy 10.2.7. The City Council finds that this policy is satisfied because the R-7 residential density is "appropriately related" to the existing land use pattern of R-7 development and is supported by available public facilities and services. No natural hazards or natural resource areas identified and mapped by the City are located on the Site.

p. TCP Policies 10.2.8 and 10.2.9. The City Council finds that the Planning Commission erred by failing to provide specific findings on TCP Policy 10.2.8. Further, the Planning Commission erred by finding that TCP Policy 10.2.9 is not met. Substantial evidence in the whole record demonstrates that the R-7 zoning district is compatible with existing neighborhoods. In fact, the Planning Commission found at page 28 that TCP Policy 2.1.23 was satisfied. The Planning Commission's finding states "The proposal is for a zone consistent with that applied to adjoining properties for development was constructed according to R-7 zoning. No compatibility issues are anticipated as a result of the zone change. This TCP Policy is satisfied." Having found TCP Policy 2.1.23 satisfied, it is inconsistent to find that TCP Policy 10.2.9 is not satisfied.

q. TCP Policy 12.1.11-6 and TCP Policy 12.3.1. The City Council finds that the Planning Commission erred by failing to adopt specific findings related to the express language of the TCP Policies. Moreover, the City Council must find that TCP Policy 12.1.11-5 is inapplicable because the TCP Policy is a direction to the City to implement a particular type of transportation system. Additionally, the City Council must find that TCP Policy 12.3.1 is also inapplicable because it is a direction to the City to support existing commuter rail. No substantial evidence supports the Planning Commission's findings that the R-7 zoning district will be less supportive of the City's transportation system and existing commuter rail than would be the R-12 zoning district because there is no evidence as to potential ridership of residents of either zone.

r. Metro Functional Plan.

Metro Code 3.07.120.E. provides as follows:

“A city or county may reduce the minimum zoned capacity of a single lot or parcel so long as the reduction has a negligible effect on the city’s or county’s overall minimum zoned residential capacity.”

The Planning Commission found at page 31 of its decision that the Applicant had failed to meet its burden of proof to demonstrate that Metro Functional Plan 3.07.120.E is satisfied, which

provides that the City may reduce the minimum zoned capacity of a single lot, provided the reduction has a "negligible effect" on the City's overall minimum zoned residential capacity. The evidence relied upon from Metro contains no comparative number which allowed the Planning Commission to conclude that the reduction of a certain number of dwelling units would be more than a negligible effect on the City's overall zoned residential capacity. However, the Applicant's May 14, 2015 letter at pages 3 and 4 explained that the zoning map amendment would have less than a one percent impact on the City's minimum zoned residential capacity. No substantial evidence rebuts the Applicant's evidence.

The Tigard Comprehensive Plan contains the City's minimum zoned capacity pursuant to acknowledgment by Metro. Tigard Comprehensive Plan Goal 10, Page 10-2, provides that an additional 6038 dwelling units can be constructed in the city (the 1996 number). Substantial evidence in the whole record demonstrates that the difference between the R-12 development of 130 lots and the R-7 development of 79 lots for a net difference of 51 lots is "negligible" because it represents less than one percent of the City's minimum zoned capacity for additional dwelling units (and an even smaller percentage of the City's total zoned capacity).

The word "negligible" is undefined in the TCDC. TCDC 18.120.010 directs that the commonly accepted, dictionary meaning be used where a word is undefined in the TCDC. "Negligible" is defined as "so small or unimportant or of so little consequence as to warrant little or no attention; trifling." Merriam-webster.com.

The City Council finds that the reduction of units is a negligible reduction. Moreover, while the phrase "negligible effect" is found in the Metro Code adopted by the Metro Council, the City Council in this quasi-judicial proceeding may apply that term based on evidence before it. Metro's argument that the reduction units is not negligible is not supported by the evidence in the record. The City Council finds that the zoning map amendment will have only a negligible effect on the City's "zoned capacity", as this term is defined in Metro Code 3.07.1010.

C. Response to additional issues.

1. Response to letter from Mr. Mitchell.

Mr. Mitchell raises two (2) issues concerning the two (2) wetlands on the site. The first is his question about the delineation of the wetlands. Venture contracted with AKS Engineering to delineate the wetlands. AKS has delineated the wetlands and the Oregon Department of State Lands ("DSL") has accepted the delineations.

Second, Mr. Mitchell raises the issues of whether the wetlands will be filled. The wetlands are not mapped on the Tigard Sensitive Lands map and are wetlands over which DSL and the United States Army Corps of Engineers ("COE") have jurisdiction. Venture has applied for a fill permit to fill both of the isolated wetlands.

The City does not regulate the fill of wetlands not shown on the City's Sensitive Lands map. To the extent the Application is able to satisfy the applicable criteria for fill permits issued by DSL and COE, then the wetlands may be lawfully filled.

Mr. Mitchell also raises two (2) issues unrelated to wetlands. His first issue concerns traffic increase in the neighborhood. The Application's evidence demonstrates that traffic generation from the subdivision proposed by Venture will be consistent with the types of streets serving the subdivision and that those streets have sufficient capacity to accommodate the expected vehicle trip generation from the site. As an aside to Mr. Mitchell's comments, Venture believes that the downzoning of this property from R-12 to R-7 is appropriate and development of the property in the R-7 zone will generate less vehicular traffic than development of the property in the current R-12 zone.

The second issue unrelated to wetlands raised by Mr. Mitchell is the lack of a neighborhood park. No applicable approval criteria require a neighborhood park. The neighborhood in which Mr. Mitchell lives, and which surrounds the site, is a pleasant neighborhood with large single-family lots providing outdoor recreation space for families and children. Venture would like to develop the same type of single-family development on this site and will be able to do so in the R-7 zones but will only be able to provide smaller lots with less open space if the R-12 zone is retained.

2. Response to Email from Tualatin Riverkeepers.

Tualatin Riverkeepers raises an issue regarding the wetlands. As noted above, the City does not regulate wetlands that are not located on the City's Sensitive Lands map. As long as Venture is able to demonstrate to the satisfaction of DSL and the COE that the isolated wetlands may be filled, then that is appropriate.

Tualatin Riverkeepers also argues that the wetlands areas may not be included in density calculations. For the reasons explained below under the discussion of net development area, density calculations are controlled by the TCDC, not Metro.

3. Calculation of Net Development Area.

The City Council finds that the definition of "net development area" in TCDC 18.715.020.A.1 excludes areas not mapped as Sensitive Lands. Wetlands outside of Sensitive Lands may be calculated as part of the net development area. Further, TCDC 18.775.010, part of the "Purpose" statement, does not control over the specific definition found in TCDC 18.715.020.A.1. Finally, TCDC 18.775.020.D, "Jurisdictional Wetlands," provides that wetlands, subject to other jurisdictional requirements and not mapped as sensitive wetlands on the City's map, are not subject to a Sensitive Lands permit.

Because the two (2) isolated wetlands areas on the site are not located on the City's Sensitive Lands map, and because they are subject to the jurisdiction of DSL and the COE, they may be filled if the approval criteria for fill are satisfied.

Ms. Doukas, representing Venture, submitted a separate letter requesting a condition of approval providing that to provide that in the event that Venture demonstrates that it is feasible to obtain the necessary fill permits, then it is appropriate to include the two (2) isolated wetlands areas in the net development area so that they may be calculated for density purposes. If fill permits are not obtained, then they must be excluded from the net development area. In any event, the City Council finds that it is feasible for Venture to obtain the necessary fill permits and, pursuant to

the relevant TCDC provisions cited above, the two (2) isolated wetlands areas may be calculated as part of the net development area and included in the density of the site.